RICHARD B. GOETZ (S.B. #115666)
rgoetz@omm.com
JACLYN BLANKENSHIP (S.B. #267524)
jblankenship@omm.com
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071-2899
Telephone: (213) 430-6000
Facsimile: (213) 430-6407

MATTHEW D. POWERS (S.B. #212682)
mpowers@omm.com
O'MELVENY & MYERS LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111-3823
Telephone: (415) 984-8700
Facsimile: (415) 984-8701

Attorneys for Defendant
VISA, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RON DAVIS, an individual, on behalf of himself and all others similarly situated,

Plaintiff,

v.

VISA, INC., a Delaware Corporation,

Defendant.

Case No. 13-CV-5125-CRB

DEFENDANT VISA, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS AND/OR STRIKE SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 9(b), 12(b)(6) AND 12(f); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: April 18, 2014
Hearing Time: 10:00 a.m.

Judge: Hon. Charles R. Breyer
SAC Filed: Feb. 28, 2014
Trial Date: None set

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 18, 2014 at 10:00 a.m., or as soon thereafter as this motion may be heard in the above-entitled court, located at 450 Golden Gate Avenue, San Francisco, California, defendant VISA, Inc. ("VISA") will, and hereby does, move the Court for an order dismissing the claims set forth in the Second Amended Complaint filed by Plaintiff Ron Davis ("Plaintiff") pursuant to Rules 9(b), 12(b)(6), and/or 12(f) of the Federal Rules of Civil Procedure.

Specifically, VISA seeks an order: (1) dismissing Plaintiff's Third Cause of Action because it sounds in fraud and Plaintiff failed to plead it with the particularity required under Federal Rule of Civil Procedure 9(b), and because it otherwise fails to state a claim under Federal Rule of Civil Procedure 12(b)(6); (2) dismissing Plaintiff's First and Second Causes of Action for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6); and (3) dismissing and/or striking Plaintiff's prayer for injunctive relief for lack of standing.

This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, Request for Judicial Notice, and Declaration of Jaclyn Blankenship, the entire file in this matter, and such other matters, both oral and documentary, as may properly come before the Court.

Dated: March 14, 2014

RICHARD B. GOETZ
MATTHEW D. POWERS
JACLYN BLANKENSHIP
O'MELVENY & MYERS LLP

By: /s/ Jaclyn Blankenship
Jaclyn Blankenship
Attorneys for Defendant
VISA, Inc.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Ron Davis ("Plaintiff") alleges that Defendant VISA Inc. ("VISA") committed "fraud" because a free benefit that VISA provides to all cardholders did not cover damage Plaintiff caused to a Zipcar—a relatively new car-sharing service that is advertised as "an alternative to the costs and hassles of owning or renting a car."[1] Under the terms of VISA's Auto Rental Collision Damage Waiver-Personal benefit (the "Benefit"), VISA reimburses cardholders for damages to "rental vehicles" that were rented using VISA cards. (Second Amended Complaint ("SAC") ¶¶ 2-3.) Here, Plaintiff never saw the terms of the Benefit (much less relied on them) before he used his VISA to pay for a Zipcar—and Zipcar makes very clear on its website that credit card rental car benefits (like the Benefit) may ***not*** cover Zipcars.[2] Nevertheless, Plaintiff contends that he "understood" that the Benefit would cover his Zipcar (although he never identifies any basis for that "understanding") and argues that VISA should be liable for breach of contract and for violating California's Unfair Competition Law (the "UCL") because VISA "failed" to provide coverage it had allegedly "promised" him.

All of Plaintiff's claims fail as a matter of law. Under the UCL, Plaintiff was required to plead and prove that he either personally relied on some specific statement by VISA that was false when it was made, *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124-26 (9th Cir. 2009), or that VISA omitted a material fact that, had Plaintiff known of it, would have altered Plaintiff's behavior. *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1091-92 (1993). But here, Plaintiff never does so. Plaintiff does not allege that he ever read the Benefit (or saw ***any*** statements by VISA about the Benefit) before paying for the Zipcar—and Plaintiff cannot possibly claim that VISA should

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[1] *See* VISA's Request for Judicial Notice ("RJN") Ex. B (excerpts from Zipcar's website).

[2] *See, e.g.*, http://www.zipcar.com/how#faqs ("**Will my credit card cover my damage fee?** Some credit cards, like American Express, include rental car insurance, which covers you when you use a rental car. And while we're really not a rental car company, *sometimes* Zipcars fall under this coverage. Give them a call to see if they'll cover you in a Zipcar. And note that sometimes they only cover certain types of vehicles, like very basic models. If you are covered by your credit card, make sure to use it to pay for your Zipcar reservations" (emphasis in original).) (RJN Ex. C at 4.)

be liable for "omitting" something from a document that Plaintiff never even saw.

Next, Plaintiff's breach of contract claim fails because Plaintiff did not satisfy the necessary conditions to activate and substantiate the Benefit and cannot now do so. *See Campbell v. Allstate Ins. Co.*, No. 97-9426 CBM (AJWX), 1998 WL 657488, at *1 (C.D. Cal. Aug. 6, 1998) (no breach of contract claim where defendant's acts are consistent with the plain language of the contract). Even if the Benefit applies to Zipcars,[3] Plaintiff failed to take a key step to activate the Benefit under the plain terms of the agreement, and also failed to allege (and cannot allege) that he satisfied the Benefit's pre-litigation filing requirements. Finally, Plaintiff's claim for breach of the implied covenant of good faith and fair dealing is superfluous and improper because it is based on the same allegations and request for relief as Plaintiff's breach of contract claim. *Careau & Co. v. Sec. Pac. Bus. Credit*, 222 Cal. App. 3d 1371, 1395 (1990) (implied covenant claim that duplicates breach of contract claim may be disregarded as superfluous).

This is now Plaintiff's third attempt to state a claim in this case. Yet he still fails to allege the facts that are necessary to support his claims. Since Plaintiff apparently cannot do so, VISA requests that the Court dismiss Plaintiff's SAC, with prejudice and in its entirety.

II. BACKGROUND

Although he alleges that VISA "misled" him, Plaintiff fails to allege that he ever read the Benefit and does not contend that he relied on any specific statement, by VISA or anyone else, when he signed up for either his VISA card or for Zipcar's services. Instead, Plaintiff simply alleges that on October 14, 2012, he "entered into a rental car transaction with Zipcar, initiating and completing the transaction with his [VISA] Card." (*Id.* ¶ 32.) While Plaintiff pleads very few facts about Zipcar's service,[4] he nevertheless contends that "Zipcar is a car rental company"

[3] For purposes of this Motion to Dismiss, VISA has assumed that membership-based services like Zipcar can qualify as car "rental" companies under the Benefit. Although VISA expects to dispute that issue if the case proceeds, Plaintiff's claims as set out below still fail as a matter of law even if Zipcars do qualify for coverage under the Benefit.

[4] For example, Plaintiff never explains that in order to use Zipcar vehicles, one must apply for (and be accepted) into Zipcar membership; agree to pay annual (or monthly) membership fees relating to expected usage of Zipcar vehicles; and coordinate with other Zipcar members when reserving time for Zipcar vehicles. (*See* RJN Ex. C at 2-3; Ex. D.) In fact, Zipcar affirmatively states that it is "not a rental car company" on its own website. (RJN Ex. C at 4.)

(and thus, according to Plaintiff, covered under the Benefit) because "Zipcar customers neither have, nor share, any ownership rights in the vehicles of Zipcar's fleet." (*Id.* ¶ 23.) In any event, according to the complaint, after Plaintiff caused approximately $721.70 worth of damage to the vehicle, he "timely initiated [a] claim" (*id.* ¶ 40) under the Benefit that VISA then denied. (*Id.* ¶¶ 42-43.)

Based on these allegations, Plaintiff asserts claims for violations of the UCL, breach of contract, and breach of covenant of good faith and fair dealing. (*Id.* ¶ 6.) Plaintiff seeks to certify two nationwide classes (Declaratory Relief Class and a Damages Class) consisting of all persons, entities, etc. who maintain a VISA card offering automobile rental collision damage waiver and who (1) made a claim for damage to a Zipcar but (2) were denied a claimed benefit because the Auto Rental CDW does not cover damages to Zipcars. (*Id.* ¶¶ 48-49.)

III. LEGAL STANDARD

Motions to dismiss should be granted where, as here, the plaintiff has failed to state any valid claim for relief. Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6) is appropriate where there is either a "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). And while the Court must accept all well-pled ***facts*** as true, the Court need not assume the truth of legal conclusions merely because they are pled in the form of factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009). In fact, "conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

In addition, for claims that "sound in fraud," such as the UCL claim at issue here, Plaintiff is required to plead "with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Rule 9(b) applies with equal force to allegations of fraud by omission, *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126-27 (9th Cir. 2009), and under Rule 9(b), Plaintiff must plead the time, place, and content of the alleged fraudulent representation or omission—"the who, what, when, where, and how"—as well as facts demonstrating his reliance on the allegedly fraudulent conduct. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citation

omitted); *see also Kearns*, 567 F.3d at 1124; *Mazur v. eBay, Inc.*, No. C-07-03967 (MHP), 2008 WL 618988, at *13 (N.D. Cal. Mar. 4, 2008) ("the same level of specificity is required with respect to [pleading] reliance").

Finally, under Rule 12(f), the Court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial . . . ." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993) (quotation marks, citation, and first alteration omitted), *rev'd on other grounds*, 510 U.S. 517 (1994).

IV. ARGUMENT

A. Plaintiff Fails to State a Claim for Any Violation of the UCL

1. Plaintiff's "Fraudulent" UCL Claim Fails

Plaintiff's UCL claim must be dismissed because Plaintiff never even saw the Benefit, much less "relied" on the Benefit's language. Here, Plaintiff was required (at a minimum) to plead and prove that he personally read and relied on some specific statement by VISA that was false when it was made, or that VISA omitted a material fact that, had Plaintiff known of it, would have altered Plaintiff's behavior. *See Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1091-92 (1993); *Kearns*, 567 F.3d at 1126 (plaintiff failed to specify "when he was exposed to" the advertisements or sales materials, "which ones he found material," or "which sales material he relied upon in making his [purchase] decision"). Simply alleging "exposure" to an allegedly false statement is not enough—Plaintiff must plead and prove actual reliance. *See Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 793-94 (9th Cir. 2012) (plaintiffs "are required to prove 'actual reliance on the allegedly deceptive or misleading statements,' . . . and that 'the misrepresentation was an immediate cause of [their] injury-producing conduct'") (citations and internal quotation marks omitted); *Guido v. L'Oreal, USA, Inc.*, No. 11-1067 CAS (JCx), 2013 U.S. Dist. LEXIS 16915, at *21-22 (C.D. Cal. Feb. 6, 2013 ("Under California law, an omission can only provide the basis for a claim of fraudulent or deceptive conduct [under the UCL] if it is material, which occurs when a plaintiff can allege that, had the omitted information been

disclosed, one would have been aware of it and behaved differently.") (internal citations omitted); *Mirkin*, 5 Cal. 4th at 1091-92 (same). Thus, to proceed on a UCL claim, Plaintiff must allege facts showing either (1) he relied on a specific statement by VISA in (or about) the Benefit or (2) that if the Benefit had included a specific disclaimer about Zipcars, he would have read that disclaimer and altered his behavior.

Plaintiff fails to make the required allegations. To be sure, Plaintiff alleges that VISA "fraudulent[ly] . . . represent[ed]" the nature and characteristics of the Benefit by failing to "make any disclaimer or exclusion for rentals made through Zipcar." (SAC ¶ 3.) But nowhere does Plaintiff allege that ***he*** personally ever saw the Benefit—or any other relevant statement by VISA—before obtaining his VISA card or before using it to sign up for a Zipcar. Nor does Plaintiff explain when or why he obtained a VISA card, how the card and the Benefit were allegedly marketed to him (if at all) or what statements from Zipcar (if any) he read or relied on in connection with the "rental transaction." Despite the fact that Plaintiff is now on his ***second*** amended complaint, Plaintiff still fails to allege that if the Benefit had included some kind of "Zipcar disclaimer" he would have seen that "disclaimer" and changed his behavior accordingly. *See Ehrlich v. BMW of N. Am.*, LLC, 801 F. Supp. 2d 908, 920 (C.D. Cal. 2010) (dismissing omission claims because plaintiff failed to allege how he would have been aware of any disclosures that defendant could have made).[5]

Plaintiff cannot evade the UCL's reliance requirement by contending that he had some amorphous "awareness" of the Benefit and its terms. California law is clear that UCL claims

[5] *See also McVicar v. Goodman Global, Inc.*, No. 13-1223-DOC (RNBx), 2014 U.S. Dist. LEXIS 26332, at *15-16 (C.D. Cal. Feb. 25, 2014) (plaintiffs made "absolutely no allegation that they or their contractor checked [defendant's] website or saw any [of defendant's] advertisement[,] . . . [or] even allege that when purchasing the product, the contractor looked at any packaging or labeling that would have contained the omitted information."); *Daniel v. Ford Motor Co.*, No. CIV 11-02890, 2013 U.S. Dist. LEXIS 80638, at *12-13 (E.D. Cal. June 7, 2013) ("[A] plaintiff's claim must fail when he never viewed a website, advertisement, or other material that could plausibly contain the allegedly omitted fact."); *Jekowsky v. BMW of N. Am., LLC*, No. C 13-02158 JSW, 2013 U.S. Dist. LEXIS 175374, at *17 (N.D. Cal. Dec. 13, 2013) (plaintiff failed to allege "any facts which, if true, would support an inference that he would have been aware of the disclosure" that plaintiff claimed should have been made).

cannot be based on purported "misrepresentations" the plaintiff never actually saw. *See, e.g., In re LinkedIn User Privacy Litig.*, 932 F. Supp. 2d 1089, 1093 (N.D. Cal. 2013) (plaintiffs did "not even allege that they actually read the alleged misrepresentation . . . which would be necessary to support a claim of misrepresentation").[6] In short, reliance is a key element of Plaintiff's UCL claims, and his failure to plead reliance means that his claim must be dismissed. *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992, 1001-02 (N.D. Cal. 2009) (dismissing UCL claims where plaintiff failed to allege reliance on alleged misrepresentations); *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326-27 (2011) (actual reliance must be pled to state a UCL claim).[7]

2. **Offering a Free Benefit is Not "Unfair"**

VISA has not engaged in anything that could qualify as "unfair" conduct. While the precise definition of "unfair" in the consumer context is somewhat unsettled, the conduct at issue must either (1) "offend[ ] an established public policy or . . . [be] immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers"; (2) be "'tethered' to specific constitutional, statutory or regulatory provisions"; or (3) cause substantial consumer injury that "is not outweighed by any countervailing benefits to consumers or to competition, and is not an injury the consumers themselves could reasonably have avoided." *Bardin v. DaimlerChrysler*

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[6] *See also Garcia v. Sony Computer Entm't Am., LLC*, 859 F. Supp. 2d 1056, 1063 (N.D. Cal. 2012) ("Although the SAC generally asserts that the statements to be found on the PS3's packaging and Sony's website are misleading and exemplary of defendants' deceptive marketing campaign . . . it does not specifically aver that [Plaintiff] relied on those particular statements, or even expressly state that he was aware of them. These omissions are fatal under Rule 9(b)."); *Noll v. eBay, Inc.*, 282 F.R.D 462, 468 (N.D. Cal. 2012) (plaintiff "does not specify which exact misrepresentation [he] relied on, whether that misrepresentation induced Plaintiff's decision to use GTC listings, or whether Plaintiff would have acted differently had there been no misrepresentation."); *Edmunson v. Procter & Gamble Co.*, No. 10-CV-2256-IEG (NLS), 2011 WL 1897625, at *5 (S.D. Cal. May 17, 2011) (dismissing UCL claims where "complaint contains general allegations about Defendant's products and advertising scheme, but almost no allegations specific to Plaintiff").

[7] Since Plaintiff has failed to allege reliance *at all*, his claims also fail for lack of Article III and statutory standing. *See, e.g., In re LinkedIn User Privacy Litig.*, 932 F. Supp. 2d 1089, 1093 (N.D. Cal. 2013) (plaintiffs did "not even allege that they actually read the alleged misrepresentation . . . which would be necessary to support a claim of misrepresentation"); *Pirozzi v. Apple Inc.*, 913 F. Supp. 2d 840, 847 (N.D. Cal. 2012) (no injury in fact for Article III purposes where plaintiff failed to allege specifically which statements she found material to her decision to purchase).

Corp., 136 Cal. App. 4th 1255, 1262-63 (2006); *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 839 n.9 (2006); *but see Lozano v. AT&T Wireless Servs.*, 504 F.3d 718, 736 (9th Cir. 2007) ("declin[ing] to apply the FTC standard [to consumer cases] in the absence of a clear holding from the California Supreme Court.").

Plaintiff fails to state a claim under any of those definitions. As discussed above, Plaintiff's "fraudulent" UCL claim fails because he does not allege he relied on any statement by VISA. Except for that alleged "fraud," there is no possible basis to conclude that VISA's conduct here—excluding car-sharing services like Zipcar from a Benefit VISA provides ***for free***[8]—is "unfair" under any definition. Plaintiff does not (and cannot) identify any "constitutional, statutory or regulatory" provision that VISA's "conduct" could possibly have violated, or articulate any basis to conclude that excluding Zipcars was "immoral or unethical" or caused "substantial" injury to anyone—particularly here, where Zipcar expressly informs its customers that credit card companies' policies may ***not*** cover Zipcar vehicles. (*See* RJN Ex. C at 4.) Because Plaintiff alleges "no factual allegations to support the claim that the omission [of a specific disclaimer for Zipcars in the Benefit] threatens to violate the letter, policy, or spirit of the antitrust laws, or that it harms competition," his "unfair" UCL claim fails as a matter of law. *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1170 (9th Cir. 2012) (affirming holding that omission of Best Buy credit card's annual fee in its advertisements was not unfair practice under *Cel-Tech* or the balancing approach, especially where the advertisements put consumers on alert that restrictions apply).

Moreover, even if Plaintiff had identified conduct that could qualify as "unfair" (which he has not), Plaintiff's "unfair" UCL claim would still fail because, as discussed above, Plaintiff has not alleged that he would have changed his conduct in any meaningful way if the Benefit had included a "Zipcar disclaimer." *See In re Firearm Cases*, 126 Cal. App. 4th 959, 981 (2005) ("unfairness" prong of the UCL requires proof of causation, *i.e.*, a "link between a defendant's business practice and the alleged harm."); *see also Davis*, 691 F.3d at 1170 ("[W]e must conclude

[8] While certain VISA cards require annual fees, the Benefit is provided free of charge to all VISA cardholders, even those that do not charge annual fees.

that any harm [Plaintiff] suffered was the product of his own behavior [i.e., not reading the terms and conditions], not the [alleged omission].") Plaintiff's "unfair" claim should thus be dismissed with prejudice.[9]

B. Plaintiff Fails to State a Claim for Breach of Contract

Next, Plaintiff's breach of contract claim should be dismissed because Plaintiff did not satisfy the necessary conditions to activate and substantiate the Benefit—and cannot do so now. To state a claim for breach of contract, Plaintiff must allege (1) the existence of a contract; (2) plaintiff's performance; (3) defendant's breach, including the terms of the contract; and (4) damages. *See In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 717 (N.D. Cal. 2011) (citing *Gautier v. Gen. Tel. Co.*, 234 Cal. App. 2d 302, 305 (1965)); *see Shoemaker v. County of Glenn*, No. 2:10-CV-01625 JAM (KJN), 2010 U.S. Dist. LEXIS 128827, at *5 (E.D. Cal. Nov. 22, 2010) ("Resolution of contractual claims on a motion to dismiss is proper if the terms of the contract are unambiguous") (citations omitted); *see also Campbell v. Allstate Ins. Co.*, No. 97-9426 CBM (AJWX), 1998 WL 657488, at *1 (C.D. Cal. Aug. 6, 1998) (granting a motion to dismiss a breach of contract claim based on the plain language of the contract).

Here, Plaintiff cannot demonstrate either his performance under the Benefit or that VISA breached any obligation to him. Plaintiff failed to take the necessary steps to activate the Benefit under the plain terms of the agreement, and does not allege (and cannot allege) that he satisfied the pre-litigation requirements set out in the Benefit.

1. **Plaintiff Failed to Activate the Benefit**

Assuming (for now) that Plaintiff's claim is actually covered under the Benefit, Plaintiff fails to allege that he took the necessary steps to "activate th[at] benefit" as required by the Benefit itself. (RJN Ex. A at "**How do I activate this benefit**?") Two steps "must" be taken to activate the Benefit: "[(i)] Initiate and complete the entire rental transaction with your eligible Visa card, and [(ii)] Decline the auto rental company's collision damage waiver (CDW/LDW) option or similar provision." (*Id.*) While Plaintiff alleges he "initiat[ed] and complet[ed]" his

[9] Plaintiff does not contend that VISA's conduct was "unlawful" under the UCL. (*See* SAC ¶ 80.)

rental car transaction with his VISA card (SAC ¶ 37), he fails to allege that he used his VISA card when he signed up to become a Zipcar member. This omission is not trivial. Zipcar members pay fees under their annual, monthly or pay-as-you-go memberships, in addition to fees that are paid when a Zipcar is actually used. (*See* RJN Ex. D.) For Plaintiff to have "complete[d] the entire rental transaction" with his Visa card, he would have had to use that card to both (1) sign up for a Zipcar membership and (2) pay Zipcar's per-use fees when he used the Zipcar at issue in this case. (*See* RJN Ex. A at "**How do I activate this benefit?**" ("For the benefit to be in effect, you ***must***: ***Initiate*** and complete the ***entire*** rental transaction with your eligible VISA card, and Decline the auto rental company's collision damage waiver (CDW/LDW) option or similar provision.") (emphasis added).) Yet here, Plaintiff never alleges that he pays his membership dues with his VISA.

2. **Plaintiff Failed to Comply With Pre-Litigation Requirements**

Plaintiff's contract claim should also be dismissed because he did not follow the necessary procedures set out in the Benefit to make out a claim—namely, the submission of all required documentation. Plaintiff generically alleges that he timely filed a claim and that he "satisfied all terms and conditions to activate the [Benefit]." (SAC ¶¶ 40, 44.) That generic boilerplate is insufficient. Plaintiff's obligation to "provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Specifically, Plaintiff has failed to allege (and, VISA suspects, cannot allege) that he submitted the following ***required*** documentation to substantiate his claim:

- "A copy of your receipt or monthly billing statement as proof that the entire vehicle rental was charged and paid for with your eligible Visa card;
- A statement from your insurance carrier (and/or your employer or employer's insurance carrier, if applicable) or other reimbursement showing the costs for which you are responsible and any amounts that have been paid toward the claim. Or, if you have no applicable insurance or reimbursement, a notarized statement of no insurance or reimbursement is required.
- A copy of the declaration page from your automobile insurance carrier.

- A copy of the accident report form.
- A copy of the initial and final auto rental agreement(s); and
- A copy of the repair estimate or itemized repair bill."

(RJN Ex. A at "**How do I file a claim?**") This information must be postmarked within 365 days of the date of the damage. (*Id.*) Failure to do this renders any otherwise covered claim ineligible under the Benefit. (*Id.* at "**What is not covered?**" ([. . .] Theft or damage for which all required documentation has not been received within 365 days from the date of the incident"); *id.* at "**Additional Provisions for Auto Rental CDW**" ("No legal action for a claim may be brought against us until sixty (60) days after we receive Proof of Loss. . . . Further, no legal action may be brought against us unless all the terms of this Guide to Benefit have been complied with fully.").) Given that 365 days have passed since the Plaintiff's October 14, 2012 accident, his failure to comply excludes any possible claim under the Benefit. Accordingly, Plaintiff's complaint should be dismissed because he does not allege sufficient ***facts*** (as opposed to conclusory boilerplate) to make out a claim that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Plaintiff's failure to submit these documents cannot be "excused"—the materials are necessary and material to VISA's evaluation of any claim. For example, without a copy of the rental agreement, VISA cannot determine the nature of Plaintiff's relationship with Zipcar—and the exact nature of that relationship is obviously a key aspect of Plaintiff's claims in this case. Although the parties disagree over whether Zipcar qualifies as a "rental car company" under the Benefit, there can be no dispute that Zipcar's subscription-based car-sharing service is ***not*** a traditional rental car company. Accordingly, the precise nature of Plaintiff's agreement with Zipcar (*e.g.*, his membership agreement and any other agreement relating to his use of Zipcar vehicles) is extremely important in this case—as just one example, leases and mini-leases are ***not*** covered under the Benefit. (*See* RJN Ex. A at "**What is not covered**".) Because Plaintiff failed to satisfy these necessary preconditions, his breach of contract claim must be dismissed. *See Careau & Co. v. Sec. Pac. Bus. Credit*, 222 Cal. App. 3d 1371, 1389 (1990) ("Where contractual liability depends upon the satisfaction or performance of one or more conditions precedent, the

allegation of such satisfaction or performance is an essential part of the cause of action."); *see also Twombly*, 550 U.S. at 555; *Crimmins v. Ralph L. Smith Lumber Co.*, 163 Cal. App. 2d 406, 408-409 (1958) (sustaining demurrer to breach of contract claim where "there has been a failure to allege facts showing that all of the conditions precedent to the defendants' duty to discharge [employee under union agreement] have happened or have been excused.").

The fact that VISA denied Plaintiff's claim does not excuse Plaintiff from his responsibility to submit the required documentation. (*See* SAC ¶ 41.) The Benefit clearly anticipates that cardholders may disagree with VISA's claims' determinations, but nevertheless expressly requires that claimants submit the required documents ***prior*** to initiating any litigation. (RJN Ex. A. at "**Additional Provisions for Auto Rental CDW**" ("No legal action for a claim may be brought against us until sixty (60) days after we receive Proof of Loss. . . . Further, no legal action may be brought against us unless all the terms of this Guide to Benefit have been complied with fully.").) The necessity of these documents is made evident by this motion—VISA is forced to defend against anemic allegations with nothing more than Plaintiff's unsubstantiated claim that he damaged a Zipcar and that Zipcars are "rental cars," even though he never provided any purported "rental agreement" to VISA (*see id.* ¶ ¶ 41, 44) or appended such an agreement to the Second Amended Complaint. Had Plaintiff provided those materials, VISA could have evaluated his assertion that his Zipcar should be covered with the benefit of all applicable facts. As it stands, Plaintiff has still refused to provide the materials necessary for VISA to do so.

C. Plaintiff's Implied Covenant Claim is Superfluous

Plaintiff's breach of the implied covenant claim should be dismissed as "superfluous and improper" because the allegations for this claim "do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action." *Careau*, 222 Cal. App. 3d at 1395.[10] Here, Plaintiff alleges that "VISA's implementation of a policy to consider cars obtained

[10] *See also De La Torre v. Am. Red Cross*, No. CV-13-04302 DDP (JEMx), 2013 WL 5573101, at *4 (C.D. Cal. Oct. 9, 2013) (dismissing plaintiff's breach of covenant of good faith and fair

through Zipcar as something other than car rentals under the Agreement violates the spirit of the Agreement and is intended to prevent . . . Plaintiff and class members who rent vehicles through Zipcar from receiving the benefit of the Auto Rental CDW." (SAC ¶¶ 72-73, 76.) But those are precisely the same factual allegations (and requests for relief) that are made in Plaintiff's breach of contract claim. (*See id.* ¶¶ 64, 67, 68.) Accordingly, the implied covenant claim is superfluous and should be dismissed. *See Careau*, 222 Cal. App. 3d at 1395; *Hood v. Superior Court*, 33 Cal. App. 4th 319 324 (1995).

D. Plaintiff Lacks Standing to Seek Injunctive Relief

Finally, Plaintiff's request for injunctive relief—including his demand that this Court "enjoin[ ] VISA from continuing and/or permitting such unfair, unlawful, and fraudulent business acts and practices," and to "forc[e] VISA to allow Plaintiff and class members to reactivate or resubmit their applications for coverage" (SAC ¶¶ 67, 86)—fails because he has not alleged (and could not credibly allege) that he is personally threatened by any repetition of the injury he claims to have suffered. To seek injunctive relief in federal court, Plaintiff must demonstrate that he is "realistically threatened by a repetition of [the violation at issue]." *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006) (citations and emphasis omitted).

Plaintiff is already personally aware of VISA's supposedly "secret" policy to exclude Zipcars from the Benefit. He thus cannot possibly be deceived by any alleged misrepresentations (affirmative or omissions) about the Benefit in the future. *See, e.g., Walsh v. Nev. Dep't of Human Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006) (no standing for injunctive relief where "no indication" of future harm); *Campion v. Old Republic Home Prot. Co., Inc.*, 861 F. Supp. 2d 1139, 1149 (S.D. Cal. 2012) ("Article III imposes a jurisdictional requirement that is more stringent than the UCL, and which, with respect to Plaintiff's claim for injunctive relief, is not

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dealing claim because plaintiff's claim was based on the same allegations supporting the breach of contract claim and was thus superfluous of that claim); *Integrated Storage Consulting Servs., Inc., v. NetApp, Inc.*, No. 5:12-CV-06209 (EJD), 2013 WL 3974537, at *8 (N.D. Cal. July 31, 2013) (dismissing breach of the implied covenant of good faith and fair dealing claim because plaintiff "merely allege[d] that by breaching those contracts, Defendant also breached the implied covenant of good faith and fair dealing").

satisfied."); *Castagnola v. Hewlett-Packard Co.*, No. 11-cv-05772, 2012 WL 2159385, at *6 (N.D. Cal. June 13, 2012) (no standing to seek injunctive relief where there plaintiff was now aware of defendant's allegedly deceptive practices to lure consumers into enrolling in a fee-based website membership); *Stephenson v. Neutrogena Corp.*, No. C 12-0426-PJH, 2012 WL 8527784, at *1 (N.D. Cal. July 27, 2012) (striking prayer for injunctive relief where plaintiff did not allege that she would purchase products in the future). Plaintiff's claims for injunctive relief should be stricken and/or dismissed.[11]

V. CONCLUSION

For the reasons stated above, VISA respectfully requests that this Court (1) dismiss Plaintiff's Third Cause of Action for failure to comply with Rule 9(b), lack of Article III and statutory standing, and failure to state a claim; (2) dismiss Plaintiff's First and Second Causes of Action for failure to state a claim; and (3) dismiss and/or strike Plaintiff's claims for injunctive relief for lack of standing.

Dated: March 14, 2014

RICHARD B. GOETZ
MATTHEW D. POWERS
JACLYN BLANKENSHIP
O'MELVENY & MYERS LLP

By: /s/ Jaclyn Blankenship
Jaclyn Blankenship
Attorneys for Defendant
VISA, Inc.

[11] Plaintiff's failure to allege facts sufficient to support his individual claim for injunctive relief likewise dooms his prayer for injunctive relief on behalf of the class. *Wang v. OCZ Tech. Grp., Inc.*, 276 F.R.D. 618, 626 (N.D. Cal. 2011) ("Allegations that a defendant's continuing conduct subjects unnamed class members to the alleged harm is insufficient if the named plaintiffs are themselves unable to demonstrate a likelihood of future injury."); *Deitz v. Comcast Corp.*, No. C-06-06352 WHA, 2006 WL 3782902, at *4 (N.D. Cal. Dec. 21, 2006) (class averments did not cure the defect in plaintiff's complaint because "[u]nless the named plaintiff is himself entitled to seek injunctive relief, he 'may not represent a class seeking that relief.'") (quotations and citations omitted).

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: March 14, 2014

RICHARD B. GOETZ
MATTHEW D. POWERS
JACLYN BLANKENSHIP
O'MELVENY & MYERS LLP

By: /s/ *Jaclyn Blankenship*
Jaclyn Blankenship
Attorneys for Defendant
VISA, INC.